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Buzz Bee Toys, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Buzz Bee Toys, Inc.,

Plaintiff,

v.

Swimways Corporation,

Defendant.

CIVIL ACTION NO. _____

JURY TRIAL DEMANDED

COMPLAINT

This is an action for, *inter alia*: common law, state and federal trade dress infringement; common law, state and federal unfair competition; state law trafficking in counterfeit goods; and, unjust enrichment.

PARTIES

1. Plaintiff, Buzz Bee Toys, Inc. (“Buzz Bee”) is a corporation organized and existing under the laws of the State of Delaware, with a business address at 309 Fellowship Road, Suite 105, Mt. Laurel, NJ 08054.

2. Upon information and belief, Defendant, Swimways Corporation (“Swimways”), is a corporation organized under the laws of Virginia, having a business address at 5816 Ward Court, Virginia Beach, VA 23455.

JURISDICTION AND VENUE

3. This action arises under the Lanham Act, 15 U.S.C. § 1051, *et seq.*, and under principles of state statutory and common law.

4. This Court has original jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338 and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

5. The amount in controversy is greater than \$75,000. Upon information and belief, there is diversity of citizenship between and among Buzz Bee and the Defendant.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

7. Upon information and belief, Swimways is a company that conducts business throughout the United States and has specifically conducted business

within the State of New Jersey, and within this District, and is subject to the jurisdiction of this Court under New Jersey's long-arm statute.

BACKGROUND

8. Buzz Bee designs, creates, promotes, markets, distributes, and provides customer support for various toys including water squirting toys (“Buzz Bee’s Product Line”).

9. Buzz Bee’s Product Line is sold through Buzz Bee Toys (HK) Ltd., and promoted throughout the United States, including in this District.

10. Each toy in Buzz Bee's Product Line has a unique ornamental appearance, constituting distinctive and protectable trade dress, that are featured in the packaging and display of the goods, and the good themselves.

11. Buzz Bee is the owner of the trade dress in Buzz Bee’s Product Line, and all goodwill in Buzz Bee’s Product Line inures to Buzz Bee.

The AVENGER Water Squirting Toys

12. One of Buzz Bee toy products is the AVENGER water squirting toy, shown in Exhibit A, part of Buzz Bee’s WATER WARRIORS line, which has been in use since at least 2007.

13. The AVENGER is packaged so that the product dominates the packaging, and is immediately perceived by consumers viewing the packaging, as shown in Exhibit A and reproduced below:



14. The AVENGER water squirting toys feature an inherently distinctive appearance constituting a protectable trade dress.

15. The trade dress of the AVENGER water squirting toys can be articulated as follows, from the rear of the toy to the front of the toy: (i) a raised portion (A) along the top of the rear body portion, having a downwardly sloping body element (B) crossing forwardly along the rear body portion, a forward wavy top projection (C) and a forward wavy lower projection (D) with a wave-like arcuate design pointing rearward (E) formed between the top projection and the lower projection; (ii) an irregularly shaped inlay (F) having a forward point located in the rear body portion; (iii) a front and bottom body portion having a complementary wave-like shape (G) to meet the rear body portion, a grip portion having a raised back (H), a downwardly extending trigger guard portion (I) having an arcuate design inlay (J) pointing forward, a forward raised conical portion (K); (iv) a forward stock portion having three sloped ridges (L); and (v) a cylindrical

orange muzzle portion (M). These elements are shown in the annotated photo shown as Exhibit B.

16. The packaging for the AVENGER water squirting toy prominently displays the foregoing features set forth in paragraph 15, so that a consumer viewing the packaging will immediately see and appreciate such features.

17. The trade dress in the AVENGER water squirting toy, both with the packaging and removed from the packaging, is collectively referred to herein as the "AVENGER Trade Dress."

18. The AVENGER Trade Dress is wholly non-functional. The water squirting elements providing the function of the AVENGER water squirting toys are internal mechanisms.

19. The AVENGER water squirting toy is a popular amongst consumers, with over 100,000 units sold, totaling over \$200,000 in sales.

20. The AVENGER Trade Dress has been used in commerce continuously and exclusively since at least 2007 in connection with water squirting toys.

21. The AVENGER water squirting toy is and has been offered for sale and sold through retail stores, including, but not limited to, Wal-Mart, and is widely available for purchase over the Internet.

22. The packaging for the AVENGER water squirting toys, including the featured appearance of the AVENGER water squirting toys, is inherently distinctive.

23. The AVENGER Trade Dress has additionally achieved distinctiveness through, *inter alia*, at least six (6) consecutive years of use, promotion, marketing and sales of the AVENGER water squirting toys, through various retail sources. Through at least these efforts, the AVENGER Trade Dress has acquired secondary meaning.

24. The AVENGER Trade Dress has come to represent Buzz Bee as the source of origin of Buzz Bee's AVENGER water squirting toys.

25. The AVENGER Trade Dress has become uniquely associated with, and hence identified with, Buzz Bee.

26. The AVENGER Trade Dress is an asset of significant value to Buzz Bee as a symbol of the quality goods and the associated goodwill.

27. In the at least six (6) consecutive years since the AVENGER Trade Dress was adopted, consumers and users of water squirting toys and the trade have come to recognize the AVENGER Trade Dress as a designator of source for water squirting toys.

28. By virtue of continuous and exclusive use in commerce of the AVENGER Trade Dress for at least the last six (6) years in connection with water

squirting toys, the AVENGER water squirting toy has become well and favorably known to the relevant trade and consuming public by virtue of the AVENGER Trade Dress.

29. As a result of the more than six (6) years of promotion and sales of the popular AVENGER water squirting toys featuring the AVENGER Trade Dress, such trade dress has achieved a high degree of recognition and fame in the relevant industry, signifying the AVENGER water squirting toys as high quality water squirting toys, with Buzz Bee as the sole source of those water squirting toys.

30. Since long prior to the acts of Swimways complained of herein, the public has come to associate AVENGER Trade Dress as a source designator for Buzz Bee's water squirting toys.

The KWIK GRIP XL Water Squirting Toys

31. One of Buzz Bee's toy products is the KWIK GRIP XL water squirting toy, part of Buzz Bee's WATER WARRIORS line, which has been in use since at least 2003. Examples of the KWIK GRIP XL water squirting toys are shown in Exhibit C.

32. The KWIK GRIP XL water squirting toys are packaged so that the product dominates the packaging, and is immediately perceived by consumers viewing the packaging, as shown in Exhibit C. The KWIK GRIP XL water squirting toys are shown below in their three-pack packaging:



33. The KWIK GRIP XL water squirting toys feature an inherently distinctive appearance constituting a protectable trade dress.

34. The trade dress of the KWIK GRIP XL water squirting toys can be articulated as follows, from the rear of the toy to the front of the toy: (i) a semi-transparent dome fill tank [A]; (ii) an oval body element overlaying the tank [B]; (iii) a grip having two rear ridges [C]; (iv) a trigger guard having a ridged insert at the front end of the trigger guard [D]; (v) side and top arcuate body pieces [E]; (vi) a futuristic coil design element [F] having three forwardly-slanted “bubble” protrusions [G] and a forwardly pointing “bubble” arrow portion [H] with a larger

dot [I] and a smaller dot [J]; and, (vii) a muzzle portion having horizontal ridges [K]. These elements are shown in the annotated photo shown as Exhibit D.

35. The packaging for the KWIK GRIP XL water squirting toys prominently displays the foregoing features set forth in paragraph 34, so that a consumer viewing the packaging will immediately see and appreciate such features.

36. The trade dress in the KWIK GRIP XL water squirting toys, both with the packaging and removed from the packaging, is collectively referred to herein as the "KWIK GRIP XL Trade Dress."

37. The KWIK GRIP XL Trade Dress is wholly non-functional. The water squirting elements providing the function of the AVENGER water squirting toys are internal mechanisms.

38. The KWIK GRIP XL water squirting toy is a popular amongst consumers, with over 2,000,000 units sold, totaling over \$4,000,000 in sales.

39. The KWIK GRIP XL water squirting toy has been used in commerce continuously and exclusively since at least 2003 in connection with water squirting toys.

40. The KWIK GRIP XL water squirting toy is and has been offered for sale and sold through retail stores, including, but not limited to, Target, and widely available for purchase over the Internet.

41. The packaging for the KWIK GRIP XL water squirting toys, including the featured appearance of the KWIK GRIP XL water squirting toys, is inherently distinctive.

42. The KWIK GRIP XL Trade Dress has additionally achieved distinctiveness through, *inter alia*, at least ten (10) consecutive years of use, promotion, marketing and sales of the KWIK GRIP XL water squirting toys, through various retail sources. Through at least these efforts, the KWIK GRIP XL Trade Dress has acquired secondary meaning.

43. The KWIK GRIP XL Trade Dress has come to represent Buzz Bee as the source of origin of Buzz Bee's KWIK GRIP XL water squirting toys.

44. The KWIK GRIP XL Trade Dress has become uniquely associated with, and hence identified with, Buzz Bee.

45. The KWIK GRIP XL Trade Dress is an asset of significant value to Buzz Bee as a symbol of the quality goods and the associated goodwill.

46. In the at least ten (10) years since the KWIK GRIP XL Trade Dress has been in use, consumers and users of water squirting toys and the trade have come to recognize the KWIK GRIP XL Trade Dress as a designator of source for water squirting toys.

47. By virtue of continuous and exclusive use in commerce of the KWIK GRIP XL Trade Dress for at least the last ten (10) years in connection with water

squirting toys, the KWIK GRIP XL water squirting toys have become well and favorably known to the relevant trade and consuming public by virtue of the KWIK GRIP XL Trade Dress.

48. As a result of the more than ten (10) years of promotion and sales of the popular KWIK GRIP XL water squirting toys featuring the KWIK GRIP XL Trade Dress, such trade dress has achieved a high degree of recognition and fame in the relevant industry, signifying the KWIK GRIP XL water squirting toys as high quality water squirting toys, with Buzz Bee as the sole source of those water squirting toys.

49. Since long prior to the acts of Swimways complained of herein, the public has come to associate KWIK GRIP XL Trade Dress as a source designator for Buzz Bee's water squirting toys.

**Swimways' Infringement of the
Avenger Trade Dress and the KWIK GRIP XL Trade Dress**

50. Swimways is selling knock-off and counterfeit copies of the AVENGER water squirting toys and the KWIK GRIP XL water squirting toys.

51. A specimen of Swimways' STORM water squirting toy was purchased from the Target store at Exton, PA, on February 7, 2014. Photographs of the Swimways' STORM water squirting toys are shown in Exhibit E. A photograph of the STORM water squirting toy is shown below:



52. Upon information and belief, the price of the Swimways' STORM water squirting toy is \$7.99.

53. The Swimways' STORM is packaged, like Buzz Bee's AVENGER water squirting toy, so that the product dominates the appearance of the packaging, and is immediately apparent when a consumer views the product for sale.

54. Comparisons of Buzz Bee's AVENGER water squirting toy and Swimways' STORM water squirting toy are shown below and in attached Exhibit F:



55. The Swimways' STORM water squirting toy is a "knock-off" copy of Buzz Bee's AVENGER water squirting toy, copying precisely every design element of the AVENGER Trade Dress.

56. Upon information and belief, and based on the exactness of the copying, Swimways intentionally copied the AVENGER Trade Dress.

57. A specimen of Swimways' STRYKER water squirting toy was purchased from the Target store in Exton, PA, on February 7, 2014. Attached as Exhibit G are photographs of Swimways' STRYKER water squirting toys.

58. The price of the three-pack of Swimways' STRYKER water squirting toys was \$5.99.

59. A comparison of Swimways' STRYKER water squirting toy and Buzz Bee's KWIK GRIP XL water squirting toy, both as packaged and unpackaged, are shown in attached Exhibit H and below:





60. As shown by Exhibit H and above, Swimways' STRYKER water squirting toy is a "knock-off" copy of Buzz Bee's KWIK GRIP XL water squirting toy, copying precisely the design element of the KWIK GRIP XL Trade Dress.

61. Upon information and belief, and based on the exactness of the copying, Swimways intentionally copied the KWIK GRIP XL Trade Dress.

62. Upon information and belief, the acts of Swimways' complained of herein were done in bad faith, and were willfully and intentionally designed to damage and trade upon the previously established goodwill of Buzz Bee in the AVENGER Trade Dress and the KWIK GRIP XL Trade Dress.

COUNT I
FEDERAL UNFAIR COMPETITION
AND FALSE DESIGNATION OF ORIGIN

63. The allegations of paragraphs 1 through 62 are incorporated herein by reference as though fully set forth herein.

64. This cause of action arises under the trademark laws of the United States, Lanham Act § 43(a), 15 U.S.C. § 1125(a).

65. Swimways has adopted and is now using a colorable imitation of the KWIK GRIP XL Trade Dress and AVENGER Trade Dress for goods which are identical to those offered by Buzz Bee.

66. The trade dress and appearance of the infringing Swimways' STRYKER and STORM water squirting toys has caused and/or will cause a likelihood of consumer confusion with Buzz Bee's KWIK GRIP XL Trade Dress and AVENGER Trade Dress for water squirting toys.

67. Upon information and belief, Swimways' STRYKER and STORM water squirting toys are offered through the same retail channels, to the same class of consumers, and at similar price points, as Buzz Bee's AVENGER water squirting toys and KWIK GRIP XL water squirting toys.

68. The trade dress and appearance of Swimways' infringing Swimways' STRYKER and STORM water squirting toys is confusingly similar to Buzz Bee's KWIK GRIP XL Trade Dress and AVENGER Trade Dress for water squirting toys.

69. Swimways' use of a colorable imitation of the KWIK GRIP XL Trade Dress and AVENGER Trade Dress in connection with Swimways' water squirting toys will cause customers and potential customers to mistakenly attribute the properties and reputation of Buzz Bee's water squirting toys to those of Swimways.

70. BUZZ BEE has no control over the quality of goods which are provided, promoted, advertised or sold by Swimways, with the result that Buzz Bee's valuable goodwill with respect to its the KWIK GRIP XL Trade Dress and AVENGER Trade Dress may be irreparably injured by the acts of Swimways complained of herein.

71. By the acts complained of herein, by offering a paintball loader that is a colorable imitation of Buzz Bee's KWIK GRIP XL Trade Dress and AVENGER Trade Dress and is confusingly similar to the KWIK GRIP XL Trade Dress and AVENGER Trade Dress Swimways has caused or is likely to cause confusion as to the source of the infringing STRYKER and STORM water squirting toys.

72. The use by Swimways of a colorable imitation of Buzz Bee's KWIK GRIP XL Trade Dress and AVENGER Trade Dress in connection with its infringing water squirting toys, and to advertise and promote Swimways' water squirting toys, constitutes unfair competition, a false description and representation and a false designation of the origin of Swimways' goods and constitutes unfair competition, all in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

73. Upon information and belief, Swimways' acts complained of herein are likely to cause and/or have caused confusion, subliminal confusion, post-sale

confusion, initial interest confusion, reverse confusion, mistake and/or deception among consumers, potential consumers, the trade or the public.

74. Upon information and belief, Swimways' acts complained of herein constitute passing off and/or reverse passing off.

75. By means and as a result of said unfair competition and false designation of origin, Buzz Bee has suffered and continues to suffer serious and substantial injury, including irreparable injury for which Buzz Bee has no adequate remedy at law.

COUNT II
NEW JERSEY STATE STATUTORY
UNFAIR COMPETITION

76. The allegations of paragraphs 1 through 75 are incorporated herein by reference as though fully set forth herein.

77. This cause of action arises under the laws of the State of New Jersey statutes N.J.S.A. §§ 56:4-1, *et. seq.*.

78. Swimways' aforementioned conduct in copying the KWIK GRIP XL Trade Dress and AVENGER Trade Dress constitutes unfair competition and trade dress infringement pursuant to the laws of the State of New Jersey and the common law.

79. Upon information and belief, by the acts complained of herein, Swimways has appropriated for its own use the KWIK GRIP XL Trade Dress and AVENGER Trade Dress, and the reputation or goodwill belonging to Buzz Bee.

80. Upon information and belief, Swimways' acts complained of herein are likely to cause and/or have caused confusion, subliminal confusion, post-sale confusion, initial interest confusion, reverse confusion, mistake and/or deception among consumers, potential consumers, the trade or the public.

81. By means and as a result of said infringement, Buzz Bee has suffered and continues to suffer serious and substantial injury, including irreparable injury for which Buzz Bee has no adequate remedy at law.

COUNT III
NEW JERSEY TRADEMARK COUNTERFEITING ACT

82. The allegations of paragraphs 1 through 81 are incorporated herein by reference as though fully set forth herein.

83. This cause of action arises under the common law, and the law of the State of New Jersey statutes N.J.S.A. § 56:3-13.16.

84. Swimways' aforementioned conduct in copying the KWIK GRIP XL Trade Dress and AVENGER Trade Dress constitutes counterfeiting pursuant to the laws of the State of New Jersey.

85. Upon information and belief, by the acts complained of herein, Swimways has used, without consent of Buzz Bee, a reproduction, counterfeit,

copy, and/or colorable imitation of the KWIK GRIP XL Trade Dress and AVENGER Trade Dress in connection with the sale, distribution, offering for sale, or advertising in New Jersey of Swimways' STORM water squirting toys and Swimways STRYKER water squirting toys, which use is likely to cause confusion or mistake or to deceive as to the source of origin of the parties' goods.

86. Upon information and belief, by the acts complained of herein, Swimways has engaged in the reproduction, counterfeiting, copying and/or colorable imitation of, the KWIK GRIP XL Trade Dress and AVENGER Trade Dress and the application of a reproduction, counterfeit, copy and/or colorable imitation of KWIK GRIP XL Trade Dress and AVENGER Trade Dress to packages intended to be used upon or in connection with the sale or other distribution in New Jersey of the Swimways' STORM water squirting toys and Swimways STRYKER water squirting toys.

87. By means and as a result of said counterfeiting, Buzz Bee has suffered and continues to suffer serious and substantial injury, including irreparable injury for which Buzz Bee has no adequate remedy at law.

COUNT IV
COMMON LAW UNFAIR COMPETITION

88. The allegations of paragraphs 1 through 87 are incorporated herein by reference as though fully set forth herein.

89. This cause of action arises under the common law.

90. Swimways' aforementioned conduct constitutes unfair competition.

91. By means and as a result of said unfair competition, Buzz Bee has suffered and continues to suffer serious and substantial injury, including irreparable injury for which Buzz Bee has no adequate remedy at law.

COUNT V
UNJUST ENRICHMENT

92. The allegations of paragraphs 1 through 91 are incorporated herein by reference as though fully set forth herein.

93. This cause of action arises under the common law.

94. Upon information and belief, by the acts complained of herein, Swimways has received a benefit from copying the AVENGER Trade Dress and the KWIK GRIP XL Trade Dress, and retention of that benefit without payment would be unjust.

95. Upon information and belief, by the acts complained of herein, Swimways has been unjustly enriched.

96. By means and as a result of said unjust enrichment, Buzz Bee has suffered and continues to suffer serious and substantial injury, including irreparable injury for which Buzz Bee has no adequate remedy at law.

PRAYERS FOR RELIEF

WHEREFORE, Buzz Bee respectfully requests the following relief:

1. That Defendant be found by this Court to infringe the KWIK GRIP XL Trade Dress and AVENGER Trade Dress;

2. That Defendant be found by this Court to have committed unfair competition;

3. That Defendant be found by this Court to have engaged in counterfeiting;

4. That Defendant be found by this Court to have been unjustly enriched;

5. That Defendant, its agents, officers, sales representatives, servants, employees, associates, attorneys, successors and assigns, and any and all persons or entities acting by, through, under or in active concert or in participation with any or all of them, be preliminarily and permanently enjoined by Order of this Court from doing, abiding, causing, aiding or abetting any of the following:

(a) directly or indirectly infringing, or causing any third parties to infringe, the KWIK GRIP XL Trade Dress and AVENGER Trade Dress;

(b) directly or indirectly engaging in, or causing a third party to engage in, any acts or activities calculated to trade upon and/or tarnish and/or dilute the KWIK GRIP XL Trade Dress and AVENGER Trade Dress, and/or the reputation or goodwill of Buzz Bee, or in any manner to compete unfairly with Buzz Bee;

(c) directly or indirectly injuring, or causing third parties to injure, the distinctive quality of the KWIK GRIP XL Trade Dress and AVENGER Trade Dress;

(d) further violating Buzz Bee's intellectual property rights and goodwill; and

(e) from otherwise competing unfairly with Buzz Bee in any manner whatsoever;

6. That Defendant take all necessary and appropriate steps to stop any promotion, advertising or sales of the infringing Swimways' STORM and STRYKER water squirting toys;

7. That the Court issue an Order directing Defendant to provide proof that they have ceased infringing the KWIK GRIP XL Trade Dress and AVENGER Trade Dress;

8. That Defendant take all necessary and appropriate steps to recall for destruction all copies of the infringing Swimways' STORM and STRYKER water squirting toys, as well as any other materials incorporating any colorable imitation of the KWIK GRIP XL Trade Dress and AVENGER Trade Dress;

9. That Defendant be required to send a written notice acceptable to Buzz Bee and to the Court to each of the customers or potential customers from

whom Defendant has received an order for the infringing STORM and STRYKER water squirting toys, notifying each customer that the orders have been cancelled;

10. The Swimways' acts of infringement, unfair competition, counterfeiting and unjust enrichment be found to be willful and intentional;

11. That Buzz Bee be awarded its actual damages and/or a disgorgement of Defendant's profits, direct and indirect, for Defendant's infringements in an amount to be determined at trial, to be increased to the maximum permitted by law, for their acts of willful infringement;

12. That the Court award Buzz Bee its costs, including attorneys' fees, and an assessment of interest;

13. That Defendant be directed to pay over to Buzz Bee all damages suffered by Plaintiffs as a result of Defendant's acts herein complained of;

14. That Defendant be directed to pay over to Buzz Bee their profits from Defendant's acts herein complained of;

15. That the Court award Buzz Bee's damages on the common law causes of action;

16. That the award of Buzz Bee's damages and Defendant's profits be trebled as a result of Defendant's willful and deliberate infringement of Plaintiffs' rights;

17. That the Court finds this case to be exceptional;

18. That Buzz Bee be awarded punitive damages for their willful and deliberate, unlawful injurious acts complained of herein; and,

19. That the Court grant such other and further relief as it deems just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted,

Date: March 27, 2014

By s/Michael F. Snyder

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